No. 82-5119

In the Supreme Court of the United States

OCTOBER TERM, 1982

NELSON BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT UNIT B

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a taking of money by false pretenses from a federally insured bank violates 18 U.S.C. 2113(b).

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OPINIONS BELOW

The opinion of the en banc court of appeals (J.A. 15-25) is reported at 678 F.2d 547. The panel's opinion (J.A. 6-13) is reported at 649 F.2d 281.

JURISDICTION

The judgment of the en banc court of appeals was entered on June 1, 1982 (J.A. 26-27). The petition for a writ of certiorari was filed on July 26, 1982, and was granted on November 29, 1982 (J.A. 28). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 2113(b) provides in pertinent part:

> Whoever takes or carries away, with intent to steal or purloin, any property or money or any

other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both[.]

* * * * *

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of taking money from a federally insured savings and loan association, in violation of 18 U.S.C. 2113(b). He was sentenced to imprisonment for one year. A divided panel of the court of appeals reversed (J.A. 6-13), but the en banc court of appeals vacated the panel opinion and affirmed petitioner's conviction (J.A. 15-25).

1. The evidence at trial, which is set out in the opinions below (J.A. 6-7, 16-17), established that on or about October 13, 1978, Lawrence and Elaine Rogovin mailed a $10,000 check from Cincinnati, Ohio, to their investment agent in Florida. The agent was to deposit the check into the Rogovins' savings account at the Dade Federal Savings and Loan Association. The agent never received the check.

A few days later, on October 17, 1978, petitioner opened an account at a Dade Federal branch office, using a false address, birth date, and social security number. Later that day, at a different branch of the bank, petitioner deposited the Rogovins' $10,000 check into his new account, giving a second false address. The Rogovins' account number had been scratched out and petitioner's new account number had been substituted in its place. After a 20-day hold-

ing period, but before the Rogovins discovered what had happened to their check, petitioner withdrew the $10,000 in cash, with accrued interest, from his account, giving a third false address.

2. A divided panel of the court of appeals reversed petitioner's conviction (J.A. 6-13). Although the court did not question the application of 18 U.S.C. 2113(b) to theft by false pretenses (J.A. 8), it held that the evidence was insufficient to prove that petitioner had a specific intent to steal the $10,000 from the bank when he withdrew the funds (J.A. 9-12).

The court of appeals granted rehearing en banc (J.A. 14), vacated the panel opinion, and affirmed petitioner's conviction (J.A. 15-27). With respect to the question on which this Court has granted review —whether 18 U.S.C. 2113(b) prohibits the obtaining of property from a bank by false pretenses—the majority of the en banc court adopted the earlier decision of the Fifth Circuit in *Thaggard* v. *United States*, 354 F.2d 735 (1965), cert. denied, 383 U.S. 958 (1966). In *Thaggard*, the Fifth Circuit relied upon this Court's decision in *United States* v. *Turley*, 352 U.S. 407, 417 (1957), in holding that Section 2113(b) embraces " 'all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny' " (J.A. 17, quoting *Thaggard*, 354 F.2d at 737).

Four judges dissented from this aspect of the en banc decision (J.A. 20-24). Relying principally on the Ninth Circuit's analysis of the statute and its legislative history in *LeMasters* v. *United States*, 378 F.2d 262, 267-268 (1967), the dissenters concluded that theft by false pretenses is beyond the reach of Section 2113(b).

SUMMARY OF ARGUMENT

A. In 18 U.S.C. 2113(b), Congress provided that "[w]hoever takes or carries away, with intent to steal or purloin," any money or property of value exceeding $100 from a federally chartered or insured bank or other financial institution, shall be guilty of a felony. If, as is usually the case, the words of the statute are to be given their common, ordinary meaning, then it would seem beyond dispute that petitioner's conduct was in violation of the statutory prohibition.

Petitioner argues, however, that because the phrase "takes and carries away" in Section 2113(b) is cast in terms similar to those used in the traditional formulation of common law larceny, it necessarily follows that Congress intended the statute to apply only to those offenses that would constitute larceny at common law. At common law, the offense of larceny required a "trespass," or nonconsensual acquisition of property from another. In this respect, larceny was distinct from false pretenses, in which the thief obtained property and title thereto with the consent of the owner, albeit a consent procured through false representation. If Congress meant this common law distinction to govern the construction of Section 2113(b), then petitioner's conduct did not violate the statute because he obtained the money with the consent—albeit fraudulently induced—of the bank.

Thus, the proper interpretation of the statute turns on whether Congress intended the words used to have their common, contemporary meaning, or the meaning attached to those words at common law. The use of the phrase "with intent to steal or purloin" in describing the scienter element of the offense suggests that Congress did not intend Section 2113(b) to be

limited to common law larceny, because the terms "steal" and "purloin" had no accepted common law meaning but instead were associated with a broader range of theft offenses than was "larceny" at common law.

B. Moreover, by the time Section 2113(b) was enacted in 1937 there was a growing trend, both in this country and in England, to do away with the artificial distinctions among different theft-related offenses (*e.g.*, larceny, larceny by trick, embezzlement and false pretenses) that had developed at common law. Thus, while the term "larceny" (and its classic "takes and carries away" formulation) had quite strictly defined content in earlier years, by 1937 larceny had begun to be regarded as a generic term connoting a broad range of theft-related crimes. In light of this background, it is difficult to believe that Congress deliberately employed common law terminology in Section 2113(b) for the specific purpose of resurrecting the arcane and illogical distinctions of the past.

C. 1. The sparse legislative history of Section 2113(b) is at best inconclusive and does not require rejection of the literal language of the statute. In 1934, the Attorney General proposed legislation that would have protected Federal Reserve System banks and banks organized or operated under federal law from robbery, burglary and theft. The theft provision would have included the "taking and carrying away" of the bank's property without the consent of the bank, or with consent obtained, *inter alia*, by means of any false or fraudulent representation, *i.e.*, false pretenses. This provision and the burglary provision were struck without explanation, however, and the legislation as enacted was limited to robbery.

In 1937, Congress expanded the coverage of the bank robbery statute to include larceny and burglary

of federally organized and insured banks. The larceny provision (now codified at 18 U.S.C. 2113(b)) does not expressly refer to false pretenses (as did the 1934 bill), but the mere use of the phrase "takes and carries away" in the text of the statute (and of the word "larceny" in the title of the bill and in the committee reports) does not necessarily establish an intent to exclude theft by false pretenses. In the Attorney General's 1934 bill, the theft provision included the formulation "takes and carries away" to describe both consensual and nonconsensual acquisitions of property. Thus, the inclusion of this formulation in Section 2113(b) may likewise have been intended to incorporate takings with or without the consent of the bank. This conclusion is buttressed by other evidence suggesting that by 1937 Congress no longer was concerned with the problems of gangsterism that had prompted passage of the limited bank robbery statute in 1934, but instead was concerned generally with protecting federally insured banks from the depletion of their assets as a result of nonforcible takings.

2. The decision of this Court in *Jerome* v. *United States*, 318 U.S. 101 (1943), does not compel the conclusion that the words used in Section 2113(b) should be given their common law meaning. Indeed, the Court's actual holding in *Jerome*—rejecting the argument that the burglary provision of the bank robbery statute embodied the common law definition of burglary—is not inconsistent with our position that the larceny provision is not limited by the common law definition of that offense. While certain language in *Jerome* and, to some extent, the Court's analysis of the legislative history of the statute suggest that Congress intended Section 2113(b) to be construed narrowly (*i.e.*, as limited to common law

larceny), they are not dispositive on the question of Congress' intent. The decision in *Jerome* was supported by other considerations that are not implicated in this case. Here, unlike in *Jerome*, if the words of the statute are given their ordinary meaning there is no danger either of disparate application of the statute in different jurisdictions, or of expansion of federal jurisdiction to all state felonies committed in banks.

3. Nor does the passage in 1939 of an entirely unrelated statute—18 U.S.C. 1025—shed light on Congress' intent in enacting Section 2113(b) two years earlier. It is true that, in proposing the enactment of Section 1025 to reach "card sharping" offenses on United States waters, the Attorney General suggested a narrow view of the general federal larceny statute (now codified at 18 U.S.C. 661), which was virtually identical in its language to Section 2113(b). However, Section 1025 was enacted hastily, without debate, and its passage does not demonstrate Congress' deliberate intent to maintain outmoded distinctions between common law larceny and false pretenses. Indeed, it is at least as reasonable to conclude that Congress acted out of an abundance of caution to ensure that, in the event the courts were to construe the larceny statute (which was derived from a 1790 statute) as limited to common law larceny, card sharps operating on United States waters would remain subject to federal prosecution. Furthermore, shortly after Congress enacted Section 1025, it enacted a broad theft statute relating to investment companies, which equated "larceny" with offenses outside the purview of the common law crime. See 15 U.S.C. 80a-36. The enactment of this statute casts considerable doubt on any attempt to discern Con-

gress' intent as to Section 2113(b) by reference to 18 U.S.C. 1025.

D. A construction of Section 2113(b) that limits its scope to common law larceny would perpetuate the technical and illogical distinctions between various theft offenses that developed largely as a result of historical accidents. Thus, under petitioner's view, the statute would cover larceny by trick, where the thief fraudulently induces the owner to part with *possession* of the property, but not false pretenses, where the thief fraudulently induces the owner to part with *title* to the property. Such incongruous results would be avoided if the words of the statute are given their common, everyday meaning.

E. This case presents no occasion for applying the "rule of lenity." Because the meaning of Section 2113(b) can be ascertained with reasonable certainty, there is no ambiguity requiring curtailment of its literal coverage. Thus, this case is distinguishable from *Williams* v. *United States*, No. 80-2116 (June 29, 1982), slip op. 7, where the Court applied the rule of lenity to a statute that "does not explicitly reach the conduct in question."

ARGUMENT

18 U.S.C. 2113(b) PROHIBITS THE TAKING OF MONEY BY FALSE PRETENSES FROM A FEDERALLY INSURED BANK

The sole question presented by this case is whether 18 U.S.C. 2113(b) is restricted in its coverage to offenses that were embraced in the common law by the term "larceny." Petitioner would answer that question in the affirmative; accordingly, he contends that Section 2113(b) does not encompass theft of property by "false pretenses." Under common law,

the crime of false pretenses traditionally was distinguished from larceny by the fact that the latter required a trespassory or nonconsensual acquisition of the property from another, while in false pretenses the property and title thereto were acquired with the consent of the other party, albeit a consent procured by false or fraudulent representations. See, *e.g.*, W. LaFave & A. Scott, *Criminal Law* 618, 622, 655 (1972); 2 W. Burdick, *The Law of Crime* 286 (1946); J. Miller, *Criminal Law* 340-341, 348-382, 390 (1934). If the distinction were followed in this case, petitioner's conduct would constitute false pretenses, not larceny, at least as larceny was defined at common law, because petitioner's withdrawal of the money from his account was with the consent of the bank, albeit a consent procured by his fraudulent conduct. It is our basic submission in this case that the common law distinction between larceny and false pretenses, while perhaps of interest to legal historians, is not determinative of the proper scope of the offense defined by Congress in Section 2113(b).

A. The Literal Language Of Section 2113(b) Includes A Taking By False Pretenses

1. Section 2113(b) provides that "[w]hoever takes and carries away, with intent to steal or purloin," any money or property of value exceeding $100, belonging to or in the possession of a federally chartered or insured bank or other financial institution, shall be fined not more than $5,000 or imprisoned not more than 10 years, or both. Petitioner's conduct in this case certainly falls within the literal terms of this language.[1] When petitioner withdrew the $10,000

[1] There is no dispute that the institution involved here, the Dade Federal Savings and Loan Association, is a protected institution under the statute.

plus interest from his account, he can be said to have "taken" the money from the teller who paid the money over to him; when petitioner left the bank, he "carried away" the money; and it seems clear that petitioner did these acts "with intent to steal or purloin" the money, in the sense that he intended to deprive the bank or the true owner of the use or benefit of the funds.[2]

It is "[a] fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). Section 2113(b) does not include a definition of the operative words used in the statute.

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[2] In accordance with the literal language of the statute, the district court instructed the jury that, in order to find petitioner guilty under Section 2113(b), it had to find (Tr. 188):

> First: The act or acts of taking from the person or presence of another, any property or money belonging to, or in the possession of a bank or savings and loan association as charged;
>
> Second: That [petitioner] do so willfully and with specific intent to steal or purloin;
>
> Third: That [petitioner] did take and carry away money exceeding $100.

The court then instructed that (Tr. 189):

> The word "purloin" as used in Section 2113(b) of the United States Code and in this charge means simply to commit larceny or theft.
>
> Within the meaning of Section 2113(b) of Title 18 of the United States Code, the terms "steal" and "purloin" would include the conduct of an accused that was designed and did result in his intentionally receiving from a federal savings and loan association money that he knew he was not entitled to receive.

Petitioner did not object to these instructions (Tr. 162-163, 194).

In these circumstances, it is perfectly reasonable to conclude—as did the court below and the majority of other courts of appeals that have considered the question—that Congress intended the words of Section 2113(b) to be given their ordinary meaning.[3] Under this approach petitioner's conduct clearly was prohibited by the statute.

2. Petitioner contends, however, that because the phrase "takes and carries away" in Section 2113(b) is cast in terms "that are similar to those used in the traditional formulation of common-law larceny" (Pet. Br. 5-6), it necessarily follows that Congress did not mean to extend the reach of the statute to conduct that would constitute false pretenses at common law. In support of this contention, petitioner relies (Br. 15) on the principle that "where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning."

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[3] The decision below, which follows the Fifth Circuit's decision in *Thaggard* v. *United States*, 354 F.2d 735 (1965), cert. denied, 383 U.S. 958 (1966), is in accord with the decisions of a majority of the courts of appeals that have considered the question. See *United States* v. *Fistel*, 460 F.2d 157, 162-163 (2d Cir. 1972); *United States* v. *Guiffre*, 576 F.2d 126, 127-128 (7th Cir.), cert. denied, 439 U.S. 833 (1978); *United States* v. *Shoels*, 685 F.2d 379, 381-383 (10th Cir. 1982), petition for cert. pending, No. 82-5550; *United States* v. *Simmons*, 679 F.2d 1042, 1045-1046 (3d Cir. 1981), petition for cert. pending *sub nom. Brown* v. *United States*, No. 82-5201. Cf. *United States* v. *Johnson*, 575 F.2d 678, 679-680 (8th Cir. 1978) (dictum). Several other courts have reached a contrary result. See *United States* v. *Feroni*, 655 F.2d 707, 709-711 (6th Cir. 1981); *LeMasters* v. *United States*, 378 F.2d 262, 263-268 (9th Cir. 1967). Cf. *United States* v. *Rogers*, 289 F.2d 433, 437-438 (4th Cir. 1961) (dictum).

United States v. *Turley*, 352 U.S. 407, 411 (1957) (footnote omitted). See also *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 59 (1911).

Petitioner's argument rests on the proposition that Section 2113(b), although literally applicable to his conduct, employs terms of art with an established common law meaning that is at odds with the contemporary meaning of the words in the statute. But other language in the statute provides evidence that Congress did not intend to limit the offense described therein to common law larceny. The phrase following the "takes and carries away" element of the offense described in Section 2113(b)—"with intent to steal or purloin"—describes the wrongful intent with which the criminal act must be performed in order for the actor to be guilty of the offense. As this Court observed in *United States* v. *Turley*, *supra*, 352 U.S. at 411-412, the term "steal" had no accepted common law meaning and was never equated with larceny. See *Factor* v. *Laubenheimer*, 290 U.S. 276, 303 (1933); *United States* v. *Armata*, 193 F. Supp. 624, 626 (D. Mass. 1961) (Wyzanski, J.). Similarly, the term "purloin," which was not included in the common law definition of larceny (see *LeMasters* v. *United States*, 378 F.2d 262, 264 (9th Cir. 1967)), is virtually synonymous with "steal" and encompasses a broader range of theft offenses than common law larceny. See *United States* v. *Johnson*, 575 F.2d 678, 679-680 (8th Cir. 1978). The use of terms without an established common law meaning in describing the scienter element of the offense thus suggests that the remaining words used in Section 2113(b) should not be limited to their common law meaning. See Note, *Determining The Proper Scope of Section 2113(b) of*

the Federal Bank Robbery Act, 51 Fordham L. Rev. 536, 543-546 (1982).

Moreover, the Court has recently rejected the notion that the common law meaning of the words used is invariably controlling in construing a modern federal statute. In *Perrin* v. *United States*, *supra*, the Court unanimously concluded that the term "bribery" in the Travel Act, 18 U.S.C. 1952, included commercial bribery and was not limited to bribery of public officials, to which the term had been limited at common law. The Court observed (444 U.S. at 43) that "by the time the Travel Act was enacted in 1961, federal and state statutes had extended the term bribery well beyond its common-law meaning," and it relied on this background in construing the statutory language in accordance with its common understanding and meaning at the time of the statute's enactment. Similarly, in *United States* v. *Nardello*, 393 U.S. 286 (1969), this Court unanimously dismissed the claim that the term "extortion" in the Travel Act should be limited to its common law definition. Noting that prior to 1961 the crime of extortion had been statutorily expanded in many states beyond its common law meaning (*id.* at 289-290), the Court concluded that Congress used the term in a generic and contemporary sense.[4] Here, too, by the time Section 2113(b) was enacted in 1937, the common law definition of larceny had been extended by statute as part of a growing trend to eliminate the illogical distinc-

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[4] In both *Perrin* (444 U.S. at 45-47) and *Nardello* (393 U.S. at 290-293) the Court concluded that the legislative history of the Travel Act also supported a contemporary construction of the words of the statute. We discuss the legislative history of Section 2113(b) at pages 22-29, *infra*.

tions that had developed at common law among various theft-related offenses.

B. The Offense Described In Section 2113(b) Should Not Be Construed As Limited By The Common Law Definition Of Larceny Because By The Time The Statute Was Enacted There Was An Emerging Trend To Expand The Concept Of Larceny Beyond The Bounds Of The Common Law Offense

1. At common law, larceny was generally defined as the felonious taking and carrying away of the personal goods of another with intent to deprive the owner permanently of his property. See, *e.g.*, 4 W. Blackstone, *Commentaries* *229, *232; 2 W. Burdick, *supra*, at 258-263. The offense originally was fashioned to prevent breaches of the peace triggered by an owner's discovery that a thief had carried away his property. Accordingly, larceny was defined in early times as the taking and carrying away of movable property or livestock "against the peace." J. Hall, *Theft, Law and Society* 6 (2d ed. 1952). A "trespass," or nonconsensual taking from the victim's possession, was thus an essential element of larceny. See W. LaFave & A. Scott, *supra*, at 618-619; Scurlock, *The Element of Trespass in Larceny at Common Law*, 22 Temp. L. Q. 12, 14-15 (1948). In order to deter breaches of the peace, the common law classified larceny as a capital offense. See W. Clark & W. Marshall, *A Treatise on the Law of Crimes* 8 (5th ed. 1952).

Over the centuries, the scope of the offense encompassed by the term "larceny" was subject to significant modification, although the common law formulation of larceny retained its classic language. For example, under the earliest applications of the doctrine of trespass, a bailee could not commit a larceny by appropriating the owner's goods that previously had

been entrusted to his possession. In the 15th Century, however, the concept of larceny was expanded to embrace a bailee's "breaking bulk"—*i.e.*, breaking open a container and appropriating all or part of its contents—even though the bailee had acquired the property with the owner's consent and his act of appropriating the goods did not create an immediate threat to the peace. *Carrier's Case*, Y.B. 13 Edw. IV f. 9, pl. 5 (1473).[5] Approximately 300 years later, after more enlightened penology had mandated less severe punishment for larceny, the concept of "larceny by trick" was fashioned as a legal fiction to enable prosecution for larceny where the owner was deceived into giving up possession (but not title) voluntarily. *Rex* v. *Pear*, 2 East P.C. 686, 1 Leach 212, 168 Eng. Rep. 208 (1779). See J. Hall, *supra*, at 40-45; W. LaFave & A. Scott, *supra*, at 620.

At the same time, the acquisition of title to property with the consent of the owner but on the basis of a false representation—long viewed as merely a private injury subject to redress by civil action only—became subject to prosecution under false pretenses statutes. See W. LaFave & A. Scott, *supra*, at 621 & n.11; W. Clark & W. Marshall, *supra*, at 443-446, 504-505, 508-509. Technically, however, theft by false pretenses was regarded as distinct from common law larceny because it involved a consensual transfer of title to the thief, albeit a consent wrongfully obtained through fraudulent representation of fact.

2. In more recent times, there was a growing realization that the traditional distinctions between common law larceny and related offenses such as theft by

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[5] See J. Hall, *supra*, at 3-39, for a thorough discussion of *Carrier's Case* and its impact on the development of the law of larceny.

false pretenses was a product, not of reasoned legal theory, but of "historical accidents in the development of the criminal law, coupled, perhaps, with an unwillingness on the part of the judges to enlarge the limits of a capital offense." *Commonwealth* v. *Ryan*, 155 Mass. 523, 527, 30 N.E. 364, 365 (1892) (Holmes, J.) (discussing the distinction at common law between embezzlement and larceny).[6] One legal historian has noted in this connection that "[t]he thrust of the law

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[6] The "historical accidents" that shaped the development of the law of theft-related offenses is described in W. LaFave & A. Scott, *supra*, at 621 (footnote omitted), quoting from Model Penal Code art. 206, App. A, at 102 (Tent. Draft No. 1, 1952):

> It may be wondered why the English judges, who did not hesitate, in the face of need, to invent murder and manslaughter, burglary and arson, robbery and larceny and other crimes, hesitated during the late 1700's to expand larceny to include the areas of embezzlement and false pretenses. The commentary to the Model Penal Code explains the matter in a nutshell as follows: "At this point in the chronology of the law of theft, about the end of the 18th century, a combination of circumstances passed the initiative in the further development of the criminal law from the courts to the legislature. Among these circumstances were the general advance in the prestige and power of the English Parliament; the conversion of the idea of 'natural law' from an instrument for judges' defiance of monarchy to a restraint upon the judges themselves, making them interpreters of immemorial custom rather than framers of policy; and, perhaps most direct influence of all, a revulsion against capital punishment which was the penalty for all except petty larceny during much of the 18th century. The savagery of this penalty not only would cause a judge to hesitate to enlarge felonious larceny, but is sufficient to account for the host of artificial limitations which they engrafted on that crime * * *."

for the last two centuries has been toward transcendence of these historical 'accidents' and the creation of a unified law of theft offenses." Fletcher, *The Metamorphosis of Larceny*, 89 Harv. L. Rev. 469, 470 (1976) (footnote omitted). Thus, when 18 U.S.C. 2113(b) was enacted, the "highly technical [distinctions] which shaped the common law as to 'trespass' or 'taking' " (*Skinner* v. *Oklahoma*, 316 U.S. 535, 539 (1942)) had been abandoned in England and in a number of the states and had been replaced by statutes creating generic theft offenses. See *Morissette* v. *United States*, *supra*, 342 U.S. at 272-273 & nn. 32, 33. In light of this background, it is extremely unlikely that Congress in 1937 deliberately employed common law terminology for the specific purpose of incorporating into the bank larceny statute arcane and anachronistic distinctions that had long since lost their vitality.

a. In the early years of the Republic, the criminal laws of the states reflected the technical distinctions of the common law; these distinctions resulted in the creation of separate offenses for each of the different common law forms of theft: larceny, false pretenses and embezzlement. The existence of these separate offenses, which were " 'very largely dependent upon history for explanation' " (*Skinner* v. *Oklahoma*, *supra*, 316 U.S. at 542, quoting O. Holmes, *The Common Law* 73 (1881)), too often resulted in unnecessary acquittals solely because of defects in pleadings.

Several respected commentators were strongly critical of the perpetuation of the common law distinctions between the various forms of theft-related offenses. In an address delivered in 1897, Justice Holmes pointed to the law of larceny as an example of an unreasoned adherence to anachronistic rules of the common law:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

* * * * *

Let me take an illustration, which can be stated in a few words, to show how the social end which is aimed at by a rule of law is obscured and only partially attained in consequence of the fact that the rule owes its form to a gradual historical development, instead of being reshaped as a whole, with conscious articulate reference to the end in view. We think it desirable to prevent one man's property being misappropriated by another, and so we make larceny a crime. The evil is the same whether the misappropriation is made by a man into whose hands the owner has put the property, or by one who wrongfully takes it away. But primitive law in its weakness did not get much beyond an effort to prevent violence, and very naturally made a wrongful taking, a trespass, part of its definition of the crime. In modern times the judges enlarged the definition a little by holding that, if the wrongdoer gets possession by a trick or device, the crime is committed. This really is giving up the requirement of a trespass, and it would have been more logical, as well as truer to the present object of the law, to abandon the requirement altogether. That, however, would have seemed too bold, and was left to statute. Statutes were passed making embezzlement a crime. But the force of tradition caused the crime of embezzlement to be regarded as so far distinct from larceny that to this day, in some jurisdictions at least, a slip corner is kept open for thieves to contend, if indicted for lar-

> ceny, that they should have been indicted for embezzlement, and if indicted for embezzlement, that they should have been indicted for larceny, and to escape on that ground.

Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469-470 (1897).[7]

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[7] Other commentators expressed similar sentiments. One author wrote:

> The boundary line separating these three offenses [common law larceny, embezzlement, and false pretenses] is often too difficult to ascertain in advance * * *. The result is that when the District Attorney has charged one of these crimes, the defendant often secures an acquittal by proving his guilt of one of the others. There may be some who believe the subtle distinctions in these crimes inherent in the nature of things, but it is submitted that their existence is entirely due to accidental, historical causes, and their perpetuation is a disgrace.

Kidd, *Larceny By Trick: False Pretenses*, 2 Calif. L. Rev. 334, 335 (1914), quoted in J. Miller, *supra*, at 374.

Another writer expressed similar criticisms of the fine distinctions that had developed at common law:

> No more unseemly spectacle can exist in a court of justice than that of a defendant admittedly guilty of some sort of theft (in the broad sense of the term) who must, nevertheless, either go free or receive a new trial, merely because the particular character of his theft has not been properly set forth in the indictment.

Note, *Larceny, Embezzlement and Obtaining Property by False Pretenses*, 20 Colum. L. Rev. 318, 323 (1920) (footnote omitted). Noting that Massachusetts had sought to remedy this problem by enacting legislation making common law larceny, embezzlement, and obtaining property by false pretenses a single crime under the generic label "larceny," this writer stated:

> Nothing can be more admirable than the simplicity, ingenuity and fairness of this masterly legislation which

b. In response to these concerns, prior to 1937 a number of states had enacted statutes that did away with the common law distinctions. Indeed, as early as 1898, this Court recognized that "the common law definition of larceny has been largely extended by statute in almost every State in the Union." *Jolly* v. *United States*, 170 U.S. 402, 407. By 1937, several states had merged false pretenses, embezzlement and larceny into a single generic larceny or theft offense.[8] While still maintaining the common law distinctions in their statutes, several other states provided that a defendant charged with false pretenses could not escape conviction on the ground that the proof showed the commission of common law larceny.[9]

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fully protects the rights of the accused, while at the same time it does away with wasting the time of the court in deciding subtleties of law, which, far from being of any practical use, are a positive impediment to justice.

Id. at 324.

[8] See, *e.g.*, Cal. Penal Code § 484, as amended by Cal. Stat. ch. 619, § 1 (1927); Mass. Gen. Laws ch. 266, § 30 (1932); Minn. Stat. ch. 101, § 10358 (1927); Mont. Rev. Code ch. 43, § 11368 (1935); N.Y. Penal Law § 1290 (Gilbert 1937); R.I. Gen. Laws tit. 39, ch. 397, §§ 15, 16 (1923); Wash. Rev. Stat. tit. 14, § 2601 (1932).

[9] See, *e.g.*, Ark. Stat. ch. 42, § 3075 (1937); Del. Rev. Code ch. 150, § 37 (1935); Ill. Rev. Stat. ch. 38, § 253 (1935); Md. Ann. Code art. 27, § 139 (1924); N.C. Code Ann. ch. 82, art. 17, § 4277 (1931); Pa. Stat. tit. 18, § 2631 (Purdon 1936); S.C. Code § 1171 (1932); Va. Code Ann. § 4440 (1924); W. Va. Code Ann. § 5965 (1932).

In addition, other states, while maintaining the common law distinctions in pleading and proof, recognized that the distinctions in punishment were no longer valid and provided that the penalty for false pretenses would be equivalent to the penalty for larceny. See Idaho Code Ann. ch. 39, § 17-3902

The clear purpose of these and like statutes was "to avoid gaps and loopholes between offenses" (*Morissette* v. *United States*, *supra*, 342 U.S. at 273) and thus avert the spectacle of guilty individuals "escap-[ing] through the breaches." *Id.* at 271. As the Court explained in *Morissette* (*ibid.*):

> The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property. The codifiers [of generic larceny-type offenses] wanted to reach all such instances.

See also *Crabb* v. *Zerbst*, 99 F.2d 562, 564 (5th Cir. 1938) ("the modern tendency is to broaden the offense of larceny, by whatever name it may be called, to include such related offenses as would tend to complicate prosecutions under strict pleading and practice").[10]

(1932); Kan. Stat. Ann. § 21-551 (1935); Mo. Rev. Stat. § 4095 (1929); Tex. Stat. tit. 17, art. 1549 (Vernon 1936); Utah Rev. Stat. § 103-18-8 (1933).

Today, the Model Penal Code and the penal laws of most states have abrogated these distinctions by enacting generic theft or larceny statutes. See Note, *supra*, 51 Fordham L. Rev. at 558 & n.132.

[10] The state courts recognized that the effect of these modern theft statutes was to do away with the technical distinctions that had developed at common law. See, *e.g.*, *Commonwealth* v. *King*, 202 Mass. 379, 388, 88 N.E. 454, 458 (1909) ("the former crimes of larceny, embezzlement, and the obtaining of property by false pretenses, are now merged into the one crime of larceny as defined by * * * statute[ ]"); *Van Vechten* v. *American Eagle Fire Insurance Co.*, 239 N.Y. 303, 306, 146 N.E. 432, 433 (1925) (Cardozo, J.) ("[l]arceny, in our law of crimes, includes the offense of obtaining property by false pretenses").

Thus, while at one time the term "larceny" (and its classic formulation) had quite limited connotations, by 1937 larceny had begun to be regarded as a generic term connotating a broad range of theft-related offenses. Against this background of a growing movement toward abandonment of the common law distinctions between larceny and related crimes, it is difficult to believe that Congress, in enacting Section 2113(b), deliberately disregarded contemporary developments in order to resurrect the arcane and illogical distinctions of the past. Indeed, in *Prince* v. *United States*, 352 U.S. 322, 324 n.2 (1957), this Court expressed its understanding that the offense described in Section 2113(b) extends beyond the bounds of common law larceny, when it noted that its use of the terms "robbery" and "larceny" in connection with Section 2113 "refer not to the common-law crime, but rather to the analogous offenses in the Bank Robbery Act."

Petitioner nonetheless contends (Br. 5-14) that the legislative history of Section 2113(b) compels the conclusion that Congress did intend to limit the coverage of the statute to conduct that would have constituted common law larceny. It is to this contention that we now turn.

C. The Legislative History Of Section 2113(b) Is Inconclusive And Does Not Compel Rejection Of The Literal Language Of The Statute

1. The sparse legislative history of Section 2113 was reviewed by this Court in *Jerome* v. *United States*, 318 U.S. 101, 102-104 (1943).

a. Prior to 1934, banks organized under federal law were protected against embezzlement (Rev. Stat. 5209, 40 Stat. 972), but not robbery, burglary, or larceny, which were punishable only under state

law. By 1934, concern was expressed about the activities of gangsters who operated habitually from one state to another in robbing banks, and about the fact that state authorities frequently were unable to cope with the problem. *Jerome*, 318 U.S. at 102, citing H.R. Rep. No. 1461, 73d Cong., 2d Sess. 2 (1934); see also S. Rep. No. 537, 73d Cong., 2d Sess. 1 (1934).

The Attorney General responded to this problem by proposing legislation (S. 2841, 73d Cong., 2d Sess. (1934)) that would have prohibited robbery (§ 4), burglary (defined as the breaking into a bank with intent to commit an offense defined by the bank-robbery statute or to commit any felony under federal or state law) (§ 3), and theft (§ 2). The latter section would have provided criminal sanctions for whoever "takes and carries away" property belonging to or in the possession of a bank "(1) without the consent of such bank, or (2) with the consent of such bank obtained by the offender by any trick, artifice, fraud, or false or fraudulent representation." This latter clause plainly would have applied to petitioner's conduct in this case. The 1934 bill passed the Senate in this form. However, the House Judiciary Committee struck Sections 2 and 3 without explanation,[11] and

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[11] Both the petitioner and the government in *Jerome* suggested that deletion of these provisions may have been attributable to Representative Sumners, the Chairman of the House Judiciary Committee, who, it was said, "sought throughout the session to confine extensions of federal power to those situations where the need to supplement state and local law enforcing agencies had become imperative." *A Note on the Racketeering, Bank Robbery, and "Kick-Back" Laws*, 1 Law & Contemp. Probs. 445, 448-449 (1934), quoted in Brief for the United States at 18 & n.16, *Jerome* v. *United States* (No. 325, 1942 Term) and Brief for Petitioner at 19-

the bill was enacted without them, applying principally to robbery. Act of May 18, 1934, ch. 304, 48 Stat. 783. See *Jerome*, 318 U.S. at 103.

b. "The limitation of the 1934 Act to robbery permitted individuals who stole money from federally insured banks, other than by the use of force or violence, to escape federal prosecution. The bank, the ultimate beneficiary of the Act, was nonetheless injured as if it had been robbed." Note, *supra*, 51 Fordham L. Rev. at 548-549 (footnotes omitted). The 1937 amendments to the bank robbery statute were intended to alleviate such anomalies.

In 1937, the Attorney General recommended amendment of the bank robbery statute "to include larceny and burglary" of banks. *Jerome*, 318 U.S. at 103, quoting H.R. Rep. No. 732, 75th Cong., 1st Sess. 1 (1937). The Attorney General explained that the limitation of the statute to robbery had produced "some incongruous results"—a "striking instance" of which was a situation in which a man had managed to gain possession of a large sum of money in the

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20, *Jerome* v. *United States* (No. 325, 1942 Term). When asked whether the legislation should not also apply to governmental institutions other than banks, Representative Sumners stated: "[W]e are going rather far in this bill, since all the property is owned, as a rule, by the citizens of the community where the bank is located. The committee was not willing to go further, and the Attorney General did not ask it to go further." 78 Cong. Rec. 8133 (1934).

There is no suggestion in the legislative record or elsewhere, however, that the House Committee deleted the larceny provision because of objections to creation of a broad larceny or theft offense that would have disregarded the common law distinctions. At all events, we submit that Congress' failure to enact the 1934 bill in full as proposed "is entitled to no significance. The proposed [legislation] * * * [was] never voted down." *United States* v. *Turley*, *supra*, 352 U.S. at 415 n.14.

momentary absence of a bank employee, without displaying force or violence or putting anyone in fear, as required for the offense of robbery. H.R. Rep. No. 732, *supra*, at 1-2. The example cited by the Attorney General would have constituted larceny at common law because the property was taken without the consent of the bank, but there is nothing in the legislative history that suggests that the proposed amendment was meant to be limited to larceny as that crime was defined at common law.

The Attorney General's 1937 bill was enacted in essentially the same form as introduced. Act of Aug. 24, 1937, ch. 747, 51 Stat. 749.[12] True, the larceny provision of that bill, which became what is now 18 U.S.C. 2113(b), did not expressly refer to false pretenses, as did the Attorney General's 1934 proposal and the contemporary state statutes that had expanded the definition of larceny beyond its common law scope (see pages 20-21, *supra*); but the mere use of the phrase "takes and carries away" in the text of the legislation and of the word "larceny" both in the title of the bill and in the committee reports does not necessarily establish an intent to exclude theft by false pretenses. The 1937 enactment, in addition to omitting the specific reference to false pretenses that had been in the 1934 bill proposed by the Attorney General, also omitted the language "without the consent of such bank" that described a trespassory taking, which was an essential element of common law larceny. Moreover, in the Attorney General's 1934 proposal, the theft section provided that whoever "takes and carries away" property *with or without the con-*

[12] The provision relevant here was amended on the House floor to provide misdemeanor sanctions for cases involving theft of less than $50 and felony sanctions for cases involving $50 or more. 81 Cong. Rec. 5376-5377 (1937).

sent of the bank was guilty of an offense. The use of the identical phrase "takes and carries away" in what was referred to as the "larceny" provision of the bill proposed by the Attorney General and enacted by Congress in 1937 therefore likewise could have been intended to incorporate both consensual and nonconsensual takings and therefore to apply to the theft by false pretenses involved here. In this regard, this Court in *Jerome* referred to the theft provision of the 1934 bill as "dealing with larceny" (318 U.S. at 103), despite the language covering the taking of property with the fraudulently obtained consent of the bank, and the opinion elsewhere referred to this provision of the 1934 bill as having "defined larceny to include larceny by trick or fraud" (318 U.S. at 105).[13]

c. During its consideration of the 1937 legislation, Congress did not express any views one way or the other on whether the bill was meant to be a codification of common law larceny. The fact that there was no reference in the reports or debates to the concern about the problems of gangsterism that had prompted passage of the 1934 bank robbery statute suggests, however, that "Congress had expanded the scope of its

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[13] Moreover, to the extent that the 1934 bill can be viewed as reflecting Congress' understanding of the common law distinctions between consensual and nonconsensual takings, its structure reflects an unfamiliarity with the arcane distinctions of the common law. Thus, Section 2 distinguished between a nonconsensual taking and a taking with consent "obtained * * * by any *trick*, artifice, fraud, or false or fraudulent representation" (emphasis added). At common law, however, it was well established that larceny by trick was classified as larceny, which required a nonconsensual taking. See, *e.g.*, J. Hall, *supra*, at 40-45; W. LaFave & A. Scott, *supra*, at 620. This suggests the unlikelihood that Congress deliberately set out to codify common law larceny when it enacted Section 2113(b) three years later.

concern with respect to taking property or money from banks." *United States* v. *Simmons*, 679 F.2d 1042, 1048 (3d Cir. 1982), petition for cert. pending *sub nom. Brown* v. *United States*, No. 82-5201. See Note, *supra*, 51 Fordham L. Rev. at 553, 555, 558-559, 562. It should be kept in mind, in this regard, that the provisions of Section 2113(b) were enacted during the Depression, following the establishment of the Federal Deposit Insurance Corporation to guarantee bank deposits. Indeed, at the same time it created the FDIC in 1935, Congress amended the bank robbery statute—which, as originally enacted in 1934, covered only member banks of the Federal Reserve System and banks organized or operating under federal law (48 Stat. 783)—to protect banks insured by the FDIC. Act of Aug. 23, 1935, ch. 614, Section 333, 49 Stat. 720. In enacting Section 2113(b) two years later, Congress may thus have sought to expand the protection afforded to the federally insured assets of the Nation's banks. See *United States* v. *Marrale*, 695 F.2d 658, 663-664 (2d Cir. 1982).

Furthermore, as the court in *Simmons* explained (679 F.2d at 1048), "although subsequent legislative history must be used with caution in attempting to derive the intent of an earlier Congress, * * * the subsequent amendments to § 2113(b) manifest a consistent attempt by Congress to expand rather than restrict the scope of that provision." These amendments clearly reflect Congress' intent to protect banks from depletion of their federally insured assets. In 1940, Congress amended the bank robbery statute to make it a federal crime to "receive, possess, conceal, store, barter, sell, or dispose of any property or money or other thing of value knowing the same to have been taken from a bank in violation of [the other provi-

sions of the statute]." Act of June 29, 1940, ch. 455, 54 Stat. 695.[14] Congress subsequently enacted a series of amendments to Section 2113, expanding the coverage of the statute to financial institutions that previously were not within its provisions.[15] "This legislative history demonstrates that Congress' concern had expanded beyond the 'gangsterism' referred to in the legislative history of the original 1934 Act and that thereafter Congress' concern was directed at least in part to the federal government's potential obligation as an insurer to reimburse various financial institutions if they were to become victims of offenses covered by § 2113." *United States* v. *Simmons*, *supra*, 679 F.2d at 1048.[16]

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[14] This provision, as subsequently modified, is currently codified at 18 U.S.C. 2113(c).

[15] Act of Aug. 3, 1950, ch. 516, 64 Stat. 394 (federally insured savings and loan associations); Act of Apr. 8, 1952, ch. 164, 66 Stat. 46 (building and loan associations, homestead associations and federally insured state cooperative banks); Act of Sept. 22, 1959, Pub. L. No. 86-354, Section 27(2), 73 Stat. 639 (federal credit unions); Act. of Oct. 19, 1970, Pub. L. No. 91-468, Section 8, 84 Stat. 1017 (federally insured credit unions).

[16] The Ninth Circuit's analysis of the legislative history in *LeMasters* v. *United States*, *supra*, on which petitioner relies (Br. 11-12), is based on the erroneous view that, in enacting Section 2113(b) in 1937, Congress was concerned solely with the problem of gangsterism that had led to the passage of the 1934 statute. The fact that Section 2113(b) applies to nonforcible takings strongly suggests, however, that the bank larceny provision was meant to deal with a broader range of concerns than those addressed in 1934. See also *United States* v. *Marrale*, *supra* (principal goal of bank robbery statute is to protect financial institutions in which the federal government has an interest); *Way* v. *United States*, 268 F.2d 785, 786 (10th Cir. 1959) (purpose of Section 2113(b) is to safeguard the stability and integrity of federal banks).

In short, the legislative history of Section 2113(b) is at most inconclusive. That history provides no firm basis for concluding that when Congress used the phrase "takes and carries away" in Section 2113(b) and attached the label "larceny" to that provision, it thereby intended to confine the statute to larceny as understood at common law.

2. Petitioner contends, however, that this Court's decision in *Jerome* v. *United States*, *supra*, supports the view that the language of Section 2113(b) should be given its common law meaning. Although petitioner concedes that "the actual holding in *Jerome* concerns the scope of the bank burglary provision in § 2113(a)," he asserts that the Court in that case "took a view of the Bank Robbery Act and its legislative history that is consistent with a narrow interpretation of § 2113(b)" (Pet. Br. 12-13).

The issue directly involved in *Jerome* was whether the prohibition in the bank burglary provision, which as originally enacted prohibited entering a bank with the intent to commit "any felony or larceny," applied to an entry to commit a felony as defined under state law. See 318 U.S. at 101-102. Jerome, a captain in the Army, had forged the signature of another officer as a co-signer of a note in order to obtain a $400 loan, on which he subsequently defaulted. The uttering of a forged promissory note was a felony under state law, and Jerome was charged with the federal offense of entering the bank to commit that state felony.

This Court held that the term "any felony" in the bank burglary provision did not include state felonies but instead included only federal felonies affecting banks. 318 U.S. at 107-108.[17] In reaching this con-

[17] This holding was incorporated by Congress in the 1948 revision of Title 18, when Congress changed the relevant

clusion, the Court observed that the bill proposed by the Attorney General in 1934 would have expressly prohibited entering a bank to commit a felony under federal or state law and also "defined larceny to include larceny by trick or fraud" (318 U.S. at 105)—a reference to the theft offense described in Section 2 of the Attorney General's 1934 proposal (see page 23, *supra*). But, the Court noted, these proposals were not in the end incorporated in the 1934 Act, and the 1937 bill "did not renew the earlier proposals to include them" (318 U.S. at 105) but instead took a "selective" approach (*id.* at 107).[18] The Court found it "difficult to conclude" that Congress, having rejected express language in the bank burglary provision in 1934 covering entries to commit state felonies, "reversed itself in 1937, and, through the phrase 'any felony or larceny' adopted the penal provisions of forty-eight states with respect to acts committed in national or insured banks" (*id.* at 105-106). The Court then continued: "It is likewise difficult to believe that Congress, through the same clause, adopted by indirection in 1937 much of the fraud provision which it rejected in 1934. Cf. *United States* v. *Patton*, 120 F.2d 73" (318 U.S. at 106).[19]

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language in what is now Section 2113(a) from "any felony or larceny" to read "any felony affecting such bank * * * and in violation of any statute of the United States, or any larceny * * *." See H.R. Rep. No. 304, 80th Cong., 1st Sess. A-135 (1947).

[18] See also *Prince* v. *United States*, *supra*, 352 U.S. at 327 ("The only factor stressed by the Attorney General in his letter to Congress [in 1937] was the possibility that a thief might not commit all the elements of the crime of robbery").

[19] In *United States* v. *Patton*, 120 F.2d 73 (3d Cir. 1941), cited by the Court in the passage quoted, the defendant was employed as a clerk for a company that had a petty cash

The last-quoted passage indicates that the Court did not understand the phrase "any felony or larceny"

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account at a bank, and he was authorized to make deposits and (with a co-signature of a fellow employee) to make withdrawals. The company drew a check on another bank payable to the petty cash account, and the defendant altered the amount from $1100 to $11,000 and deposited it in the company's petty cash account. He then drew a check on that account for approximately $11,000, forged the co-signature, and entered the bank and cashed the check therein. The defendant was indicted for (1) entering a national bank with intent to commit larceny, in violation of what is now 18 U.S.C. 2113(a), and (2) taking and carrying away with intent to steal or purloin money in excess of $50, in violation of what is now 18 U.S.C. 2113(b). 120 F.2d at 74. The government conceded that the taking and carrying away charged as offense (2) was the equivalent of the larceny mentioned in the unlawful entry charged in offense (1). *Id.* at 75. The Third Circuit reversed both convictions, concluding that there was no trespassory taking as required for the offense of larceny, but rather a turning over of the money with the fraudulently obtained consent of the bank (*id.* at 75-76)—*i.e.*, false pretenses—an offense that the Third Circuit held was not covered by the statute.

In reaching this result, the court in *Patton* did not examine Congress' intent in enacting the statute, but merely assumed that the statute proscribed only common law larceny. Accordingly, since the defendant's conduct amounted to a theft by false pretenses and not a larceny at common law, the court felt bound to reverse despite its observation that "[i]t may well be that the distinction [drawn by the common law] is artificial and illogical and was evolved by judges in a humane search for legal methods for saving defendants from the consequences following conviction upon a charge of larceny which at the time many of the cases were decided was a capital offense." 120 F.2d at 76. Subsequently, in *United States* v. *Simmons*, *supra*, the Third Circuit concluded that Section 2113(b) does apply to the offense of false pretenses. Thus, *Simmons* while not citing *Patton*, effectively overruled that decision.

in the burglary provision of the statute to encompass entry to commit the fraud or false pretenses offenses proposed in 1934 but not described explicitly in the 1937 Act. The Court twice stated in *Jerome* that the term "larceny" as used in the phrase "any felony or larceny" was defined elsewhere in the statute (318 U.S. at 105, 106)—a reference to the "takes and carries away, with intent to steal or purloin" language now contained in Section 2113(b).[20] If, as the Court indicated, fraud or false pretenses was not covered by the phrase "any felony or larceny" in the burglary provision, then, under the Court's reasoning, fraud or false pretenses likewise could be thought not to be covered by what the Court regarded as the relevant definition of the term "larceny"—the present Section 2113(b), under which petitioner was convicted.

While the language and to some extent the analysis of the decision in *Jerome* thus suggest an interpretation of the statute contrary to the one subsequently adopted by a majority of the courts of appeals to consider the issue and urged by us here, we believe that they are not dispositive on the question of Congress' intent. The issue under consideration here was never briefed or argued in *Jerome*, and the Court's references to the scope of the larceny provision of the statute essentially followed the position taken by the government, which it has since repudiated.[21] In its

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[20] In its brief in *Jerome*, the government took the position that the "larceny" mentioned in the burglary prohibition was defined by what is now Section 2113(b). Brief for the United States at 27, *Jerome* v. *United States* (No. 325, 1942 Term). See also *United States* v. *Patton*, *supra*, 120 F.2d at 75.

[21] The fact that the government long ago took the position that the statute was limited to common law larceny (in a case in which that point was not directly in issue) does not prevent

brief in *Jerome* (at 27), the government contended that the burglary and larceny provisions codified the common law versions of those offenses. Accordingly, the government argued that because burglary at common law prohibited entries with intent to commit any felony, the burglary portion of the statute barred entries into a bank for the purpose of committing any state, as well as any federal, felony. The actual holding in *Jerome*—rejecting the government's argument that the burglary provision of the bank robbery statute embodied the common law definition of burglary—thus is not inconsistent with the position we urge here.

Moreover, the decision in *Jerome* was supported by other considerations that are not implicated in this case. The Court's analysis in *Jerome* started from the premise that Congress generally does not make the application of a federal statute dependent on state law. 318 U.S. at 104. The Court thought it significant that Congress omitted from the burglary provision of the statute any reference to state laws, whereas it had incorporated state laws in other federal penal statutes by specific reference. *Id.* at 106. This led the Court to conclude that Congress had no intention of incorporating all state felonies into the bank burglary statute simply because the offense may have been committed in a federally insured bank, which would federalize many offenses connected only fortuitously to the bank.[22] In addition, the Court was

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the government from urging a different interpretation of the statute in this case. See *Barrett* v. *United States*, 423 U.S. 212, 222 (1976).

[22] The Court stated (318 U.S. at 106):

> The Act extends protection to hundreds of banks located in every state. If state laws are incorporated in § 2(a),

concerned that if the interpretation of the phrase "any felony" were made dependent upon state criminal laws, it would result in disparate application of the statute in different jurisdictions. An offense punishable as a felony under the laws of one state might be classified as a misdemeanor in another state. *Id.* at 106-107.[23]

These concerns are not present in the instant case. The position we espouse would, if accepted, result in a uniform application of Section 2113(b) throughout the United States. Moreover, our interpretation of the statute would not expand federal authority to all state felonies committed in banks but rather would permit prosecution only for those theft offenses that directly implicate the government's interest in protecting against depletion of funds of federally insured financial institutions.

In sum, while it certainly was reasonable for the Court in *Jerome* to assume that Congress would not have expanded federal criminal jurisdiction over all state felonies committed in federal banks without explicitly expressing such an intent, there is no comparable reason to assume that Congress, without explanation, incorporated into the statute obsolete com-

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Congress has gone far toward putting these banks on a basis somewhat equivalent to "lands reserved or acquired for the use of the United States" as described in § 272 of the Criminal Code, 18 U.S.C. § 451. In such a case all violations of penal laws of the state within which the lands are located become federal offenses. Criminal Code § 289, 18 U.S.C. § 468. Such an expansion of federal criminal jurisdiction should hardly be left to implication and conjecture.

[23] The Court noted that while the offense in question—uttering a forged check—was classified as a felony in Vermont, it was labelled a "high misdemeanor" in New Jersey. 318 U.S. at 107.

mon law distinctions that increasingly had been repudiated both in this country and in England, thereby creating an anomalous gap in the protections afforded federally insured banking institutions.

3. Petitioner also argues (Br. 13-14) that his view of the scope of Section 2113(b) is supported by the enactment in 1939 of what is now 18 U.S.C. 1025. Act of Aug. 5, 1939, ch. 434, 53 Stat. 1205. Section 1025 prohibits the obtaining of property by false pretenses upon any waters or vessel within the special maritime and territorial jurisdiction of the United States. This statute was enacted at the request of the Attorney General to reach "card sharping" offenses on the high seas. It is true that the Attorney General's letter proposing the legislation reflects a narrow view of the existing federal enclave larceny statute,[24] which was derived from a 1790 statute[25] and was written in language virtually identical to Section 2113(b). But petitioner's reliance on 18 U.S.C. 1025 is unavailing for a number of reasons.

To begin with, the dangers of relying on post-enactment events are compounded when those events concern an entirely unrelated statute. Section 1025 was a hastily enacted measure, dealing with a matter of little practical import, which went through Congress without debate or hearings. Cf. *United States* v. *Batchelder*, 442 U.S. 114, 120 (1979); *Scarborough* v. *United States*, 431 U.S. 563, 569 (1977). Thus, the statute was not considered in depth by Congress, and its passage does not demonstrate Congress' deliberate intent to maintain the ancient distinctions between common law larceny and false pretenses.

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[24] That statute is currently codified at 18 U.S.C. 661.

[25] Act of Apr. 30, 1790, ch. 9, Section 16, 1 Stat. 116.

Moreover, to the extent that Congress may have focused on the need for the legislation, it is just as reasonable (if not more so) to conclude that Congress was acting out of an abundance of caution, to ensure that there would be no question that federal authorities could prosecute card sharps who operated on vessels in United States waters. Congress may have feared that, because the existing larceny statute derived from a statute enacted in 1790, courts construing that statute would refuse to attribute to the 1790 Congress an intent to embody in the statute an expansive view of larceny that went beyond the common law definition.[26]

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[26] As it happens, the courts in recent years have refused to construe the offense described in 18 U.S.C. 661, the current descendant of the 1790 larceny statute, as being confined to the contours of common law larceny. Under the common law, in order to convict for larceny it was necessary to prove that the thief intended permanently to deprive the owner of his property. See *United States* v. *Northway*, 120 U.S. 327, 335 (1887); K. Sears & H. Weihofen, *May's Law of Crimes*, 346 (4th ed. 1938); 2 W. Burdick, *supra*, at 263; W. LaFave & A. Scott, *supra*, at 637. That requirement, however, has uniformly been rejected by federal courts in their recent interpretations of 18 U.S.C. 661. See *United States* v. *Gristeau*, 611 F.2d 181, 183 (7th Cir. 1979), cert. denied, 447 U.S. 907 (1980); *United States* v. *Maloney*, 607 F.2d 222, 225-226 (9th Cir. 1979); *United States* v. *Henry*, 447 F.2d 283, 285 (3d Cir. 1971). Similarly, the statute has been held to proscribe conduct that would constitute embezzlement, but not larceny, under common law. See *United States* v. *Armata*, 193 F. Supp. 624 (D. Mass. 1961). Accordingly, although the statute—like Section 2113(b)—may be written in terminology borrowed from the common law, the courts generally have refused to read into it the common law's archaic and arbitrary limitations. The fact that the courts have read the language of 18 U.S.C. 661, which is virtually identical to that of Section 2113(b), as reflecting an intent to codify an offense

Furthermore, shortly after Congress enacted Section 1025 it enacted a theft statute relating to investment companies, which, although entitled "Larceny and embezzlement," applied broadly to whoever "steals, unlawfully abstracts, unlawfully and willfully converts * * * or embezzles" money or property. 15 U.S.C. 80a-36. Congress in that enactment equated the term "larceny" with offenses clearly outside the purview of the common law crime. Thus, there is no basis for concluding that Congress deliberately set out in 1937 to codify and preserve outmoded common law distinctions.[27]

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broader in scope than common law larceny strongly supports a similar construction of Section 2113(b). See Note, *supra*, 51 Fordham L. Rev. at 545 n.43, 550 n.79.

[27] Accordingly, Section 1025 is relevant, if at all, only insofar as its enactment reflects the contemporaneous interpretation by the Department of Justice of the scope of the federal larceny statute. That interpretation, however, while ordinarily entitled to some deference (but see *United States* v. *Turley*, *supra*, 352 U.S. at 415 n.14), was in this instance plainly incorrect as a matter of law. It was recognized at the time that

> where the victim [of a card sharp] is fraudulently induced to believe he has lost, when in fact the game is a cheat and he had no chance to win, the obtaining of his money by this means would seem not to be larceny, but obtaining by false pretenses, since he consents to the passing of title to the money. Nevertheless, it has been held that obtaining money by cheating at cards is larceny by trick, because the victim did not intend to give up title to the money unless fairly won.

K. Sears & H. Weihofen, *supra*, at 331-332 (footnotes omitted). See also Note, *Criminal Law-Larceny-Cheating at Cards*, 10 Minn. L. Rev. 253-254 (1926) ("* * * it seems that cheating at cards was larceny at common law as well as by

D. Restricting The Scope Of Section 2113(b) To Common Law Larceny Would Yield Anomalous Results

A construction of Section 2113(b) that limits its scope to larceny as generally understood at common law would perpetuate in this setting the technical and long-discredited distinctions between various types of theft offenses as they existed in years past. See *United States* v. *Shoels*, 685 F.2d 379, 383 (10th Cir. 1982), petition for cert. pending, No. 82-5550; *United States* v. *Simmons*, *supra*, 679 F.2d at 1051 (Adams, J., concurring). See also Note, *supra*, 51 Fordham L. Rev. at 555-559. These distinctions "did not ever correspond to any essential difference in the character of the acts or in their effect upon the victim." *Van Vechten* v. *American Eagle Fire Insurance Co.*, 239 N.Y. 303, 306, 146 N.E. 432, 433 (1925) (Cardozo, J.) (discussing distinction between common law larceny and embezzlement).

One such distinction that may be especially anomalous in the context of bank theft is that between larceny by trick, in which the thief fraudulently induces the owner to part with *possession* of the property, and false pretenses, in which the thief fraudulently induces the owner to part with *title* to the property. The former was regarded as larceny at common law, but the latter was not. If Section 2113(b) were interpreted to embody the offense of larceny as defined at common law, larceny by trick of more than $100 from a federally chartered or insured bank would be a fed-

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statute both in this country and in England"); *Paine* v. *United States*, 7 F.2d 263 (9th Cir. 1925). Thus, the enactment of Section 1025 may support the view that in the late 1930s neither Congress nor the Attorney General was well versed in the technicalities of common law larceny. See note 13, *supra*.

eral felony, yet the obtaining of title to the same amount of money by false pretenses—petitioner's conduct here—would not even be an offense under that section.[28]

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[28] See Note, *supra*, 51 Fordham L. Rev. at 557-558 (footnotes omitted), discussing *United States* v. *Johnson*, 575 F.2d 678 (8th Cir. 1978):

> That such technical distinctions based upon title versus possession no longer prove helpful, and would produce anomalous results, especially when the thefts involve money, is illustrated by the following example. In a recent case, the defendant requested a bank teller to provide a $100 bill in exchange for four twenty-dollar bills and two ten-dollar bills. The defendant then "palmed" the $100 bill for a ten-dollar bill, asserted that the teller had erred, and thereby received another $100 bill. This action apparently fits within the definition of taking by false pretenses; the defendant induced the teller to part with possession and title by means of his false representation. Had the court found that the defendant's actions constituted taking by false pretenses, the defendant could not have been convicted under a narrow definition of section 2113(b). The court, however, labeled his action larceny by trick, which was part of common-law larceny, and therefore included it under a strict interpretation of section 2113(b).
>
> In larceny by trick, the artificial legal device of "constructive possession" is used to find the necessary trespassory element. Although the teller voluntarily relinquished actual possession, the bank retained "constructive possession" because the defendant's lie negated the bank's true intent to part with possession. Arguably, the court was in error because the teller intended to pass both title and possession, in which case the theft could not have been larceny by trick, but rather it would have been taking by false pretenses. An assertion that the bank intended to retain title in such a transaction is implausible; the bank hardly expected the same coins or bills to be returned.

Another anomalous distinction is that between false pretenses and larceny by unilateral mistake, where the thief obtains the owner's consent to pass title and possession, not through fraud or misrepresentation, but solely by virtue of the owner's mistake. See, *e.g.*, W. LaFave & A. Scott, *supra*, at 629; Note, *supra*, 51 Fordham L. Rev. at 538 n.8. In a recent case, *United States* v. *Etchison*, No. 81-5246 (4th Cir. Feb. 3, 1983), a bank mistakenly credited to the defendant's account approximately $10,000 deposited by another customer. After realizing the bank's error, the defendant withdrew the money by executing two withdrawal slips. On appeal, the defendant argued that her conduct amounted to false pretenses, not larceny, and therefore that she was wrongfully convicted of violating Section 2113(b), because her execution of the withdrawal slips constituted a misrepresentation on her part that induced the bank to transfer title and possession of the money. In other words, the defendant sought to escape liability by arguing that her actions were more, rather than less, culpable in that she actively induced the transfer of title to and possession of the funds instead of "silently accepting the windfall." *Id.* at 5. Although the court of appeals ultimately rejected the defendant's argument, this case is illustrative of our point that a narrow construction of Section 2113(b) as covering only common law larceny produces absurd results.

Of course, "[t]he end result of a theft, whether or not it constitutes common-law larceny, is the same: The defendant has wrongfully obtained money to the bank's detriment." Note, *supra*, 51 Fordham L. Rev. at 559 (footnote omitted). As this case well illustrates, applying Section 2113(b) only to those nonforcible takings that happen to fit within the maze of arbitrary distinctions that served to define lar-

ceny at common law would thus produce anomalous results that bear no relationship to the culpability of the wrongdoer or to the interstate character of the offense. Indeed, nontrespassory, or consensual, takings from banks are likely to involve large interstate schemes, which pose much more difficult enforcement problems for local prosecutors than does simple larceny. See Note, *supra*, 51 Fordham L. Rev. at 563 & n.159.[29] Furthermore, limiting Section 2113(b) to common law larceny also would leave a gap of uncertain dimensions in federal protection for federally chartered or insured financial institutions.[30]

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[29] The lower courts uniformly have refused to countenance a similar anomaly in construing the bank robbery provision of 18 U.S.C. 2113(a). At common law, a conviction for robbery required proof of, *inter alia*, a taking "from the person or personal presence" of another. K. Sears & H. Weihofen, *supra*, at 296; W. Clark & W. Marshall, *supra*, at 530. Despite the fact that Section 2113(a) tracks the common law formulation by prohibiting the taking of property "from the person or presence of another," three courts of appeals have held that a robber may violate the statute by "constructively" taking from the person or presence of another. Consequently, these courts have rejected arguments that a conviction under Section 2113(a) will not lie where the robbers kidnapped individuals or otherwise threatened harm from a distance, avoiding a direct and confrontational "taking from the presence" of the bank. See *United States* v. *Alessandrello*, 637 F.2d 131, 144-145 (3d Cir. 1980), cert. denied, 451 U.S. 949 (1981); *United States* v. *Hackett*, 623 F.2d 343, 345 (4th Cir. 1980); *Brinkley* v. *United States*, 560 F.2d 871, 873 (8th Cir. 1977). Cf. *United States* v. *Marx*, 485 F.2d 1179, 1182 (10th Cir. 1973).

[30] Embezzlement and misapplication of funds by officers and employees of banks are separately prohibited by 18 U.S.C. 656, and the acquisition of property by fraudulent means would be barred in at least some circumstances by 18 U.S.C. 1014, considered recently by this Court in *Williams* v. *United States*, No. 80-2116 (June 29, 1982). See, *e.g.*, *United*

E. Because The Literal Language Of Section 2113(b) Includes A Taking By False Pretenses, The Rule Of Lenity Does Not Support A Narrow Construction Of The Statute

Petitioner's final contention (Br. 14-16) is that his conviction should be reversed pursuant to the "rule of lenity." He asserts that the coverage of Section 2113(b) is ambiguous and that the statute must therefore be construed strictly in his favor.

As a "guide to statutory construction" (*Callanan* v. *United States*, 364 U.S. 587, 596 (1961)), the rule of lenity is not applicable unless there is a "grievous ambiguity or uncertainty in the language and structure of the Act" (*Huddleston* v. *United States*, 415 U.S. 814, 831 (1974)) such that even "[a]fter [a court has] 'seize[d] everything from which aid can be derived * * *' [it is still] left with an ambiguous statute." *United States* v. *Bass*, 404 U.S. 336, 347 (1971), quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). Lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one. * * * The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, *supra*, 364 U.S. at 596 (footnote omitted)

Because the ambit of Section 2113(b) can be ascertained with reasonable certainty, the rule of lenity does not support petitioner's claim. As we have demonstrated above, the literal language of the statute applies to petitioner's offense. The conduct for which he was convicted clearly involved the "tak[ing] and

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States v. *Pinto*, 646 F.2d 833, 838 (3d Cir. 1981), cert. denied, No. 81-2088 (Oct. 4, 1982). See also Note, *supra*, 51 Fordham L. Rev. at 559 n.137.

carr[ying] away, with intent to steal or purloin," of more than $10,000 from a federally insured financial institution. The clear words of the statute are not rendered ambiguous by virtue of the fact that in earlier times the phrase "takes and carries away" referred to common law larceny. By the time Section 2113(b) was enacted, larceny had begun to be regarded as a generic term that included all forms of theft. Moreover, the legislative history is at most inconclusive and does not compel a narrow reading of the statute, which would restore the illogical distinctions of the past and lead to the sort of "incongruous results" (H.R. Rep. No. 732, *supra*, at 1) that Congress sought to avoid in enacting the statute. The narrow interpretation proffered by petitioner would thus thwart the statute's purpose of "protect[ing] federally insured banks by expanding the category of proscribed takings beyond robbery to include those committed without the use of force or violence." Note, *supra*, 51 Fordham L. Rev. at 555 (footnote omitted).

In these circumstances, the rule of lenity does not require a narrow interpretation. As the Court observed in *United States* v. *Moore*, 423 U.S. 122, 145 (1975), quoting *United States* v. *Brown*, 333 U.S. 18, 25-26 (1948):

> The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose * * *. Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

See also, *e.g.*, *McElroy* v. *United States*, No. 80-6680 (Mar. 23, 1982), slip op. 16-17, quoting *United States* v. *Bramblett*, 348 U.S. 503, 509-510 (1955). Cf. *SEC*

v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 355 (1943), quoting *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1867) (" 'The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one * * *' ").

Considerations of fairness also do not weigh in favor of petitioner's assertion of the rule of lenity. Petitioner unquestionably had "fair warning * * * as to what conduct is criminal and punishable by deprivation of liberty or property." *Huddleston* v. *United States*, *supra*, 415 U.S. at 831. Here, the theft of money from the bank was clearly illegal under state law regardless of the applicability of Section 2113(b). See Fla. Stat. Ann. § 812.021 (West 1976). Moreover, prior to petitioner's commission of the offense, the United States Court of Appeals for the Fifth Circuit had held that Section 2113(b) covered theft by false pretenses. *Thaggard* v. *United States*, 354 F.2d 735 (1965), cert. denied, 383 U.S. 958 (1966). Hence, petitioner was not "forced to speculate, at peril of indictment, whether his conduct [was] prohibited." *Dunn* v. *United States*, 442 U.S. 100, 112 (1979).

Petitioner's reliance (Br. 15) on *Williams* v. *United States*, No. 80-2116 (June 29, 1982), is misplaced. In *Williams*, the Court concluded that the act of depositing several checks that are not supported by sufficient funds is not within the literal terms of 18 U.S.C. 1014 because that course of conduct does not involve the making of a "false statement" that "overvalues" property, as required by the statute. Slip op. 5-6. Because Section 1014 "does not explicitly reach the conduct in question" the Court was "reluctant to base an expansive reading on inferences drawn from

subjective and variable 'understandings.'" Slip op. 7 (footnote omitted). In contrast to the situation in *Williams*, the literal language of Section 2113(b) does reach petitioner's conduct and it is petitioner's narrow interpretation of the statute that would produce anomalous results.[31]

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[31] Petitioner also relies (Br. 15-16) on a statement in *Jerome*, 318 U.S. 104-105, to the effect that federal statutes that duplicate or build upon state law should be narrowly construed. This statement is of little, if any, assistance to petitioner. As already noted (see pages 33-34, *supra*), the Court in *Jerome* was concerned with the problem of lack of uniformity that would obtain under the government's construction of the burglary provision of the bank robbery statute, and with the additional anomaly that, under the government's view, an individual could be haled into federal court for entering a federally insured bank with the intent to commit *any* state felony, including offenses (such as rape or adultery) that had no relationship to the federal interest of protecting banks. Such concerns are not present here.

Moreover, as one commentator has noted (Note, *supra*, 51 Fordham L. Rev. at 560-561 (footnotes omitted)):

> A narrow construction [of Section 2113(b)] * * * assumes that state law regarding nontrespassory offenses is both adequate and enforced. Under this interpretation of the statute, only burglary and common-law larceny were made federal crimes by the 1937 amendment. Yet these two crimes already were covered by state law. Thus, Congress duplicated state laws, presumably because it deemed them inadequate to deal with burglary and larceny from federal banks. When interstate schemes are involved, state laws regarding non-trespassory thefts may also be inadequate. Arguably, Congress intended to include both types of theft in section 2113(b). Furthermore, the danger of diluting state responsibility for local crimes is not present when the financial institutions involved are federally insured; trespassory or non-trespassory thefts committed against them may no longer be purely local in nature.

In short, the rule of lenity does not require a court to disregard the literal language of a statute and adopt instead an interpretation that defies common sense and revives archaic and arbitrary distinctions. The rule of lenity thus provides no basis for reversing petitioner's conviction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 400408 1295